(No. 2617)

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

| | |
|---|---|
| INTER-ISLAND STEAM NAVIGATION COMPANY LIMITED, a Hawaiian corporation, Defendant, Plaintiff in Error, vs. GEORGE E. WARD, Plaintiff, Defendant in Error. | In Error to the Supreme Court of Hawaii. |

## BRIEF FOR PLAINTIFF IN ERROR.

W. O. SMITH,
L. J. WARREN,
E. W. SUTTON,
HENRY HOLMES,
C. H. OLSON,
*Attorneys for Plaintiff in Error.*

Filed this.....day of ....., 19....
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

# United States Circuit Court of Appeals

FOR THE

## NINTH CIRCUIT

(No. 2617)

---

INTER-ISLAND STEAM NAVIGATION COMPANY LIMITED, a Hawaiian corporation,
Defendant, Plaintiff in Error,

vs.

GEORGE E. WARD,
Plaintiff, Defendant in Error.

} In Error to the Supreme Court of Hawaii.

---

## BRIEF FOR PLAINTIFF IN ERROR.

---

*Statement of the Case.*

This case comes to this Court by writ of error to the Supreme Court of the Territory of Hawaii, jurisdiction in this regard having been conferred upon the Court of Appeals by the Act of Congress of January 28, 1915 (Public. 241-63d Congress), an act amending Sections 128, 238 and 246 of "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911.

The action was originally instituted on March 10, 1913, in the Circuit Court of the first Judicial Circuit of the Territory of Hawaii, by the filing of a complaint wherein George E. Ward, the defendant in error, was plaintiff and the Inter-Island Steam Navigation Company, Limited, the plaintiff in error, was defendant.

Briefly stated the complaint alleged that Ward was employed by the Inter-Island Steam Navigation Company, Limited, here-

inafter referred to as the "Company," in the capacity of machinist and engineer and as foreman of the coal conveyor operated by the Company, situated on Honolulu Harbor; that the Company negligently permitted and kept in use on the coal conveyor a steel cable which had become worn and frayed by reason of which condition it was unsafe and dangerous; that this cable, by reason of its worn condition, slipped from its position on the pulleys at the end of the conveyor which jutted out into the harbor and that while Ward was endeavoring to restore the cable to its proper position on the pulleys and without negligence on his part the cable slipped, struck and hurled him to the wharf below, a distance of from twenty to thirty feet, and that by his fall Ward suffered certain injuries and was permanently crippled. The complaint also alleged the negligence of the Company in failing to provide a suitable guard rail or platform at the end of the conveyor where the accident occurred so that reasonable protection might be afforded those working at that particular point. Damages in the sum of $50,000 were claimed on account of the injuries sustained. The date of the accident was alleged to be July 8, 1912.

The defendant Company having filed a general denial, the action came on for trial before the First Judge of the First Circuit Court of the Territory of Hawaii and a jury. At the conclusion of the plaintiff's case the defendant Company moved for a non-suit on the following grounds.

That the plaintiff failed to show that the defendant Company was guilty of negligence as charged or at all.

That the proximate cause of the injury to plaintiff was his own act.

That the evidence showed plaintiff to be guilty of negligence which not only contributed to the accident, but without which it could not have occurred and that the evidence showed that the plaintiff assumed all risks of the employment which resulted in the accident.

The motion for a non-suit having been granted the plaintiff sued out a writ of error from the Supreme Court of Hawaii

with the result that the judgment of non-suit was held erroneous and the case sent back for a new trial. This decision of the Supreme Court of Hawaii is found in Volume 22 of Hawaiian Reports, page 66, et seq. (Tr. pp. 16-33.)

Following this decision a second trial of the case was had before the First Circuit Court and a jury, the defendant Company, as in the first trial, moving for a judgment of non-suit at the conclusion of the plaintiff's case on the grounds above enumerated. (Tr. p. 310.) This motion having been denied by the trial Judge because of the previous decision of the Supreme Court, the defendant put on its case. The defendant requested the Court to instruct the jury to find in its favor, and this having been denied, the case went to the jury, resulting in a verdict in favor of the plaintiff in the sum of $13,000. The defendant Company excepted to the verdict as contrary to the law and the evidence and moved for a new trial which was denied. Judgment was entered in favor of the plaintiff in the sum of $13,097.20.

The defendant Company thereupon took the case to the Supreme Court of Hawaii by writ of error, the main errors assigned being the denial of its motion for non-suit, the refusal of the trial court to instruct the jury to find in its favor, the rendering of the verdict, the denial of its motion for a new trial and the entering of judgment against the defendant Company and in favor of plaintiff in the sum of $13,097.20.

In addition to these errors certain others were assigned relating to the admission of evidence and the giving and refusing of certain instructions, but as these have not been assigned as errors in the present proceeding they will not be enumerated.

On March 24, 1915, the Supreme Court of Hawaii rendered its decision on the writ of error holding that no error had been committed. The decision is reported in Volume 22 of the Hawaiian Reports, page 488 et seq. (Tr. pp. 767-793.) On April 7, 1915, judgment was entered in the Supreme Court of Hawaii, pursuant to the decision, affirming the judgment of

the First Circuit Court of the Territory of Hawaii. Immediately thereafter the present writ of error was sued out.

In order that the questions presented by the assignments of error may be clearly understood we shall, before stating them, give a brief description of the place where the accident occurred, of the mechanical appliances of the coal conveyor which were involved in the accident, Ward's relation to the work being carried on, and the manner in which he was injured. In the record and likewise in this brief the words "Mauka," "Makai," "Ewa" and "Waikiki" will be found. These words are used to denote directions—Mauka meaning toward the mountains, which lie to the East; Makai meaning toward the sea, which is the west, and Ewa and Waikiki being the names of places, Ewa being on the North and Waikiki on the South.

*The Coal Conveyor.*

The coal conveyor upon which the accident occurred resembles a railroad trestle built in the shape of the letter "L," one end extending some six or seven hundred feet into the harbor of Honolulu, upon a wharf at which vessels lie; the other end of the "L" extending along the shore about the same distance to a yard where the coal is dumped and stored. Upon this trestle, which is some twenty-five feet above the wharf and a similar height above the ground, are laid two parallel steel tracks upon which run small coal cars. These parallel tracks meet at the ends of the trestle, in nearly perfect circles. The coal cars are drawn from one end of the conveyor to the other end and back by means of an endless steel cable about twenty-eight hundred feet long and three-quarters of an inch in diameter. (Tr. pp. 100, 156.)

The power plant for operating the steel cable is located upon the wharf below the trestle, about equidistant from the shore and the end of the wharf, and consisted, at the time of the accident, of a steam engine operating a drum around which the steel cable is wound four times. (Tr. pp. 52, 111, 162.)

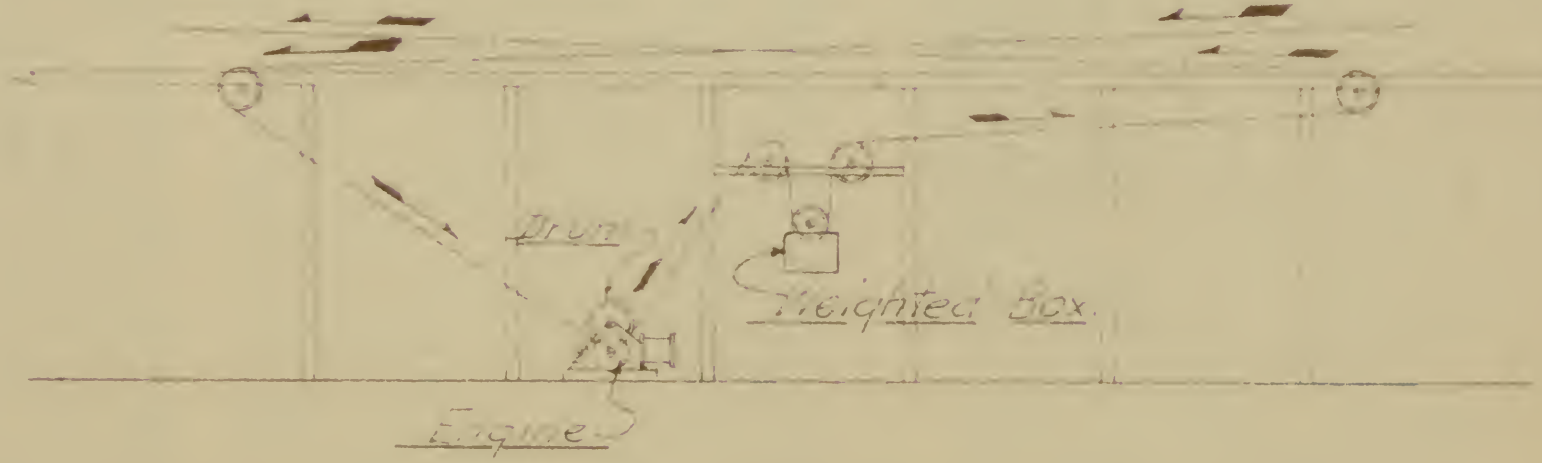


FIGURE No. 1

*The Weighted Box.*

Between the drum around which the cable is wound and the track on the trestle above, there is suspended on the cable, by means of pulleys or sheaves, a weighted box. (Tr. pp. 51, 112.) This box with its weight is the most vital appliance on the conveyor in relation to the accident to the plaintiff *for had it been lifted*—provision for which was made—*Ward would not have been injured.* The accompanying illustration (Figure 1) shows the location of the weighted box in relation to the engine and drum. Without the tension or "purchase" which is produced by this weight the cable would slip where it is wound around the drum. (Tr. pp. 162-165.) The weight keeps the cable drawn tight at all times and takes up all the slack in the cable not only at the drum, but throughout its length. The arrows in the illustration indicate the direction in which the cable is propelled by the engine and drum so that it is clear that as the cable is unwound from the drum the weighted box takes up whatever slack there is in the cable in the same way in which slack on a windlass has to be taken in and tension maintained on the rope being hauled in, in order to prevent the rope slipping on the windlass. As this steel cable is endless the weighted box takes in the slack not only from the drum but from the opposite side as well. In this way slack in the cable is taken up immediately and the cable is kept taut or under strain throughout its length. Ward described this weight as "an automatic means for taking slack from the drum." (Tr. pp. 48-49.) At the curves and circular ends of the conveyor the weight makes the cable "hug" the pulleys and thus it is kept in the middle of the track. When the cable, from any cause, slips off one or more pulleys at these curved places in the track, the effect of the weight is to make the cable assume a straight line between the pulleys on which it still remains in place.

Provision is made on the coal conveyor whereby when the cable comes out of position on the pulleys it may be restored to its position around the pulleys *without difficulty and without danger*. The weighted box, which has just been described, and whose function is to keep the cable taut, may be lifted off the cable by means of a block and tackle, which was always in position and ready for use, and thereby all tension on the cable is removed and the cable may be replaced on the pulleys by hand, without difficulty (Tr. pp. 55-56, 67-68, 70-71, 81, 102). As Ward's injury occurred when he attempted to pry the cable into position *without having first lifted the weight* the importance of this point is evident. This point will be discussed at length later.

*The Steel Cable.*

After the cable passes from the drum past the weighted box, it goes up upon the trestle between the rails on the South or Waikiki side of the trestle. From this point the cable goes between the rails of this track towards the shore and then turns south to the coal dumping yard. Here the cable follows the curve in the track, goes around the end of the conveyor, starts back between the rails of the opposite track, and comes back to the curve at the shore end of the wharf upon which part of the conveyor is located. Thence the cable goes west between the rails of this track, passing over the place where the drum, engine and weighted box are located, to the harbor end of the conveyor, thence around this curve and thence shoreward again to a point one hundred feet beyond the place where the cable came up to the track from the weighted box. There it goes down to the drum (Tr. pp. 51, 110-112).

The accompanying illustration (Figure 2) shows the route followed by the cable more clearly than words can describe it, the view being taken from above looking down upon the conveyor.

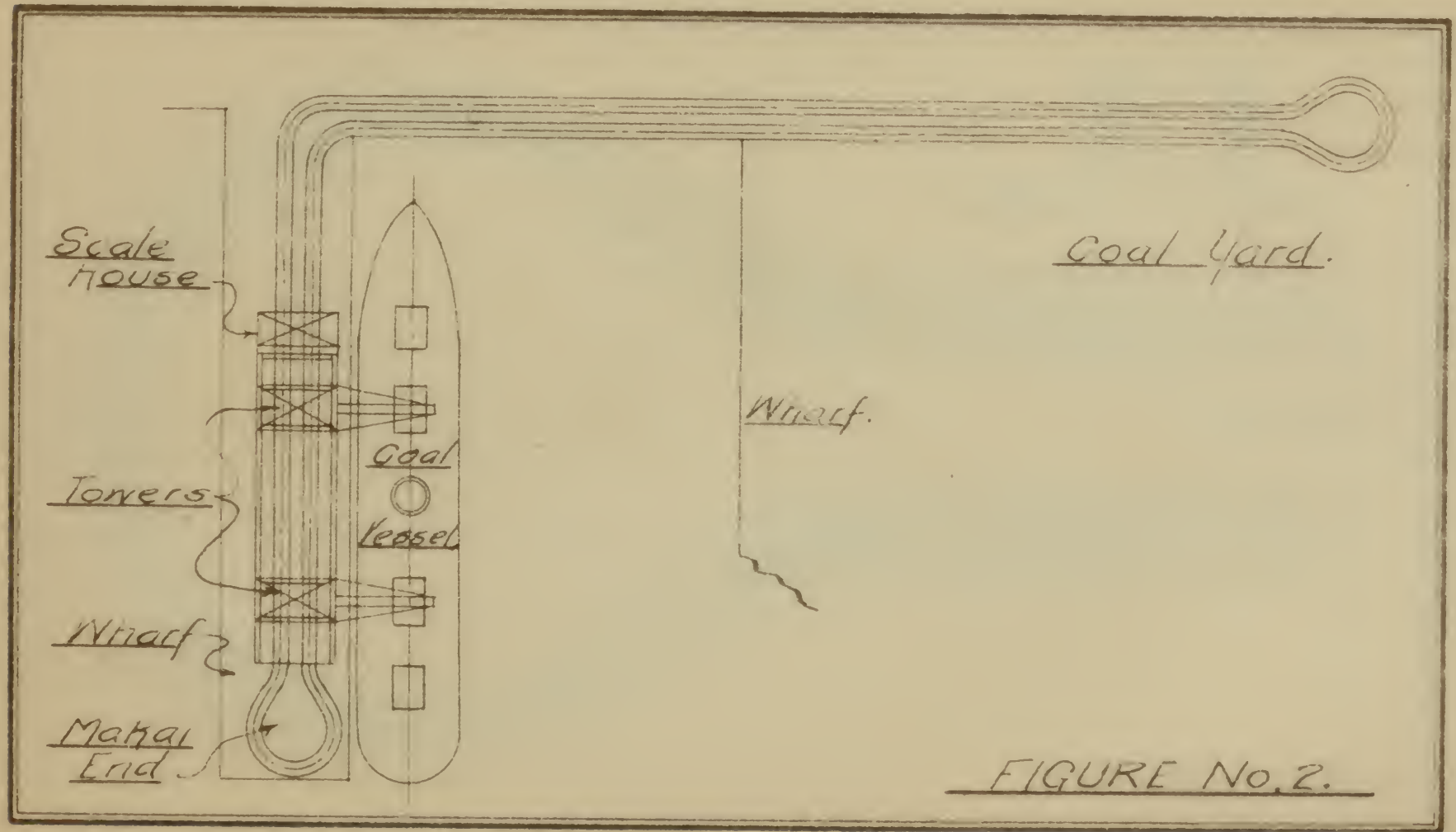
Scale house
Towers
Wharf
Makai End
Coal Vessel
Wharf.
Coal Yard.

FIGURE No. 2.

In the straight parts of the track the cable is supported at intervals of about twenty feet by horizontal rollers or "dollies" (Tr. pp. 238-239.) These dollies are sunk into the track, only about two inches projecting above the level of the ties upon which the steel rails are laid. Defendant's Exhibit 7 shows one of these dollies with the groove worn in it by the steel cable.

At all of the curves in the track the cable is kept in position midway between the rails upon which the cars run by means of upright pulleys, having a flange at the lower side, defendant's exhibit 5 being one of these pulleys, showing the groove worn in it by the cable (Tr. pp. 47, 51-52, 58-59) (See also Figure 3).

At the curved end of the conveyor at the outer end of the wharf there are approximately sixty of these pulleys, the cable running on the side of the pulleys nearer the outer part of the circle. For a short distance at each end of the curve the cable has to turn gradually back into a straight line. To confine the cable in the middle of the track at these two points there are two series of eight pulleys, the cable on these eight pulleys being on the side of the pulleys next to the inside track (Tr. pp. 47, 51-52).

The accompanying illustration (Figure 3) shows the position of the cable both on the sixty pulleys and on the two series of eight pulleys at the ends of the curves.

As we have already stated small coal cars run upon these tracks drawn by the cable, being attached thereto by grips similar to the grips employed on cable cars. These grips consist of a long grooved "shoe" or slot swung underneath the car, the cable sliding through this groove while the cars are standing still and being gripped in this slot as in a vise when the car is to be moved.

In the straight parts of the track the horizontal dollies above referred to are lower than the bottom of the grip so that the

grip does not touch the horizontal pulleys as the car passes over them. On the curves, however, the grip passes around the pulleys coming in contact with one after the other. The grip is attached to the car in such a manner that when the strain of the cable brings to bear on the car the forward end of the grip rises somewhat while the rear end of the grip is correspondingly depressed. The result is that as the car passes around the curve the forward end of the grip, as it comes in contact with each pulley, makes each pulley rise slightly and the depression of the after end of the grip tends to make the pulleys drop back to their normal position.

The system which we have attempted to describe, is that which has been installed in many different places by the C. K. Hunt Company, and is in general use.

*Operation of Conveyor.*

When the conveyor is in operation in unloading coal vessels and dumping the coal obtained therefrom in the coal yard, the operation is briefly as follows:

On a track, elevated about ten or twelve feet above, but separate from the one we have described, are located two large movable towers, each having independent power appliances. These towers are placed in such positions that coal buckets may be dropped into the hatches of the vessel to be unloaded from long arms or booms extending out from the towers over the vessel lying at the wharf. The bucket from this tower is lowered into the hatch and filled with coal in the hold of the ship. Then the bucket is hauled up to the boom on the tower, brought in to the tower and the coal dumped into a hopper (Tr. pp. 49, 76, 153-154).

One of the twenty coal cars is then shoved into position beneath the hopper, filled with coal, gripped to the cable and started on its way to the dumping yard, stopping at the scale house to weigh the load and change the grip on the car to another part

of the cable, as at this point the cable goes down to the engine and drum, through the sheaves on the weighted box and up to the track at a point about 100 feet back of where it went down —so that for this distance two parts of the cable run next each other in the same direction (see Figure 1). At the dumping yard an automatic device opens the sides of the coal car permitting the coal to fall out, and the empty car then continues its course, without stopping, back to the place at which it was filled with coal. The same thing is performed at the other hopper, loaded coal cars during the operation being continually going down the one track to the dumping yard and empty cars coming back on the other (Tr. pp. 51, 157-159).

*Condition of the Cable.*

The cable in use at the time of the accident was alleged to have become worn to such an extent that it was unfit for use and dangerous and unsafe, and in fact the only allegation of negligence on the part of the defendant company was its permitting this cable to remain in use on the conveyor. It is true that the cable was somewhat worn and roughened on the outside, but its strength was not questioned and there is nothing in the evidence which tends in the slightest degree to indicate that it was not sufficiently strong to meet all of the requirements of its use, and moreover *it did not break.* The reason that the continued use of the cable was alleged as negligence is not because of injury occurring from the cable itself—but because the cable came out of its position on a few pulleys and *this created the occasion for Ward's going to the place* where it came off for the purpose of replacing it. Taking all of the plaintiff's evidence as true regarding the condition of the cable, all that this shows is that the cable was worn to such an extent that wires on its outside surface had broken and stuck out, and that this condition gave the cable a tendency to rise on the pulleys and *possibly* this caused the cable to come off. The defendant Company claimed that this did not constitute negligence on their part and in any

event did not make the accident, *which happened after this condition had ceased to operate,* the proximate result of this condition.

*Ward's Connection with the Conveyor.*

George Ward, the plaintiff in the action, was in the employ of the defendant Company at the time that the coal conveyor was erected, some five years ago, he being in charge of the erection and installation of all of the steel work, including the tracks upon which the coal cars run, the pulleys and dollies which keep the cable in position, the engine and drum for operating the cable, the weighted box and the sheaves or pulleys in connection therewith, as well as the steel mechanical appliances in the towers (Tr. pp. 149-150, 214-215). He knew of the weighted box, its purpose and the result of raising the weight on the tautness of the cable (Tr. pp. 53, 111-112, 310). He had been foreman of the coal conveyor practically all of the time from the date when the conveyor was constructed up to the time of his accident, whenever foreign coal ships were being unloaded, as was the case at the time of the accident in which he was injured (Tr. pp. 117-118, 216). He also knew that during all of this time there had never been any guard rail or platform at the circular ends of the conveyor.

*Promise to Replace Cable.*

To avoid the application of the doctrine of assumption of risk, which would prevent any recovery, Ward testified that on the Saturday preceding the Monday on which the accident occurred he had told Mr. Gedge, the Secretary of the Company, that the cable had a tendency to rise on the pulleys, due to the roughened condition and that it should be replaced with a new cable; and that Mr. Gedge had replied that the cable would be replaced. Nothing was said by Ward as to any danger to be apprehended from the continued use of the cable, and no danger

was in fact apprehended. Under the circumstances the complaint and promise can be considered only as made with regard to the efficiency of the conveyor and not with respect to danger. Consequently we contend that the complaint and promise, if made, do not exempt Ward from the doctrine of assumption of risk.

Another point upon which the Company relies is that the replacing of the cable was clearly within the line of Ward's employment and hence the complaint and promise with respect to the cable did not relieve Ward from the assumption of the danger and risk attendant upon that operation.

*The Accident.*

On Monday, the 8th day of July, 1912, the cable came off the pulleys at the harbor end of the conveyor while a coal vessel was being unloaded. At the time that this happened Ward was on board the coal vessel, according to his own testimony, and first became aware of the fact that something was wrong by being called by one of the hands (Tr. p. 181). He thereupon left the coal vessel, went along the wharf, and climbed the flight of stairs to the scale house, which is approximately midway between the outer end of the conveyor and the shore end. Arriving there he inquired as to what had occurred and was informed that the cable had come off the pulleys at the beginning of the curve at the harbor end of the conveyor. Before he arrived the engine which operated the drum and propelled the cable had been stopped and the cable itself was no longer in motion (Tr. pp. 182, 286-290).

Upon arriving at the makai end of the conveyor he found that the cable had slipped off the first, or easternmost, four pulleys of the series of eight on the Ewa or North side of the turn, but that it was still in position on the other four pulleys of this series of eight, as well as being in position on all of the sixty pulleys around the curve and on the eight pulleys on the other

side of the curve (Tr. p. 183). Having observed this condition (and necessarily noting a fact well known to him at the time that, at this particular point on the track there was no guard rail or platform) (Tr. p. 215), and without lifting the weighted box or causing it to be lifted (Tr. p. 310), which would have removed the tension from the cable, Ward attempted by the use of a crowbar to pry the cable back into position (Tr. pp. 184-185). Later in the brief we shall discuss the evidence as to just where Ward stood and how he was using the crowbar. As to this point the evidence was conflicting. Some of the witnesses, including Ward, testified that Ward stood on the inside of the track with his crowbar on the outside of the cable and prying inward holding the cable (Tr. p. 185); others testified that Ward stood astraddle of the cable, facing toward the sea or westward, with his crowbar on the outer side of the cable and attempting to pry upward and inward or toward the center of the circle. While thus attempting to pry the cable back into position and when it was nearly in the place where it could be slipped down over the four pulleys from which it had escaped, something slipped, either the crowbar at its lowest point or, as seems more likely, the cable upon the crowbar, with the result that the cable slipped off the other four pulleys of this series of eight, slid up the crowbar striking Ward on the inside of his right leg (Tr. pp. 297-298). Ward was hurled off of the track and down to the wharf below, a distance of some twenty-five feet, with the result that he sustained the injuries for which he is seeking recovery.

The foregoing facts having been developed on the plaintiff's case the defendant Company moved for a non-suit on the following grounds:—

That the plaintiff failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to the plaintiff was his own act; that the plaintiff was guilty of negligence which not only contributed to the accident,

but without which the same could not have occurred, and that the plaintiff assumed all risks of the employment which resulted in the accident (Tr. p. 310). This motion having been denied the Company put on its case and then requested that the jury be instructed to return a verdict in its favor. This request having been denied the case went to the jury who found for the plaintiff in the sum of $13,000.00.

The plaintiff in error relies upon all of the errors assigned, which are as follows:—

(1) That the Supreme Court of the Territory of Hawaii erred in its judgment in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for the reason that said judgment was and is contrary to the evidence and the law;

(2) That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable William J. Robinson, Third Judge of said Circuit Court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non-suit for the reason that the plaintiff in said action failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to the plaintiff was his own act; that the evidence showed the plaintiff to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred, and for the reason that the evidence shows that the plaintiff assumed all risks of the employment which resulted in the accident;

(3) That the Supreme Court of the Territory of Hawaii erred in affirming the action of said Circuit Court in refusing to instruct the jury in said cause to render a verdict for the defendant, plaintiff herein, as requested by said defendant, said requested instruction being as follows:

> I instruct you gentlemen of the jury that there is no evidence tending to prove that the negligence of the defendant, if any, was the proximate cause of the injuries sus-

tained by the plaintiff, and that your verdict must be for the defendant.

(4) That said Supreme Court of the Territory of Hawaii erred in affirming the action of the jury in said Circuit Court before whom said cause was tried in rendering their verdict in favor of the plaintiff and against the defendant in the sum of $13,000, for the reason that there was no evidence tending to prove that the negligence of the defendant, if any, was the proximate cause of the injuries sustained by the plaintiff, and that said verdict should have been for the defendant;

(5) That the Supreme Court of the Territory of Hawaii erred in affirming the action of such Circuit Court in denying the motion of the plaintiff in error for a new trial, for the reason that said verdict of said jury was and is contrary to the law and the evidence and the weight of the evidence;

(6) That the Supreme Court of the Territory of Hawaii erred in affirming the action of said Circuit Court in giving, rendering, entering and filing judgment in favor of plaintiff and against the defendant in the sum of $13,000 together with costs taxed in the sum of $97.20 for the reason that the plaintiff in said action failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to plaintiff was his own act; that the evidence showed the plaintiff to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred, and for the reason that the evidence shows that the plaintiff assumed all risks of the employment which resulted in the accident (Tr. pp. 796-799).

Inasmuch as the same points apply to each of the assignments of error, we shall in the argument deal with these points separately rather than each assignment separately. In this manner unnecessary repetition will be avoided. The points to be discussed and the order in which they will be taken up in the argument are as follows:—

1. There is no evidence showing defendant guilty of any negligence.

   (a) The cable was not in a dangerous condition or unfit for use.

   (b) Assuming the roughened condition of the cable caused the cable to slip off the pulleys, at the most it merely furnished the occasion for Ward's going to replace it, and the condition of the cable was therefore not the proximate cause of the accident.

   (b. 1.) While ordinarily the determination of the proximate cause is for the jury, yet where reasonable men can come to but one conclusion from the facts the question is one of law for the Court.

2. Ward was guilty of negligence which not only contributed to the injury, but without which the injury would not have occurred.

3. Ward assumed all risks attendant upon repairing any defective appliances which hindered or stopped the operation of the conveyor, this work being part of his regular duty.

   (a) The promise to replace the cable being made with respect to the efficiency of the work and not with respect to the safety of the workmen, did not, as a matter of law, relieve Ward from his assumption of the risks attendant upon replacing it on the pulleys.

4. The Court did not follow nor properly apply the principles laid down by it in its first decision wherein it decided that Ward assumed whatever risks there were from the lack of a guard rail.

## 1. THERE IS NO EVIDENCE IN THE CASE SHOWING DEFENDANT GUILTY OF ANY NEGLIGENCE.

It will be borne in mind that in the complaint the Defendant Company is charged with negligence in but two particulars, i. e. in not providing a platform and guard rail at the end of the conveyor where the accident occurred, and in permitting the continued use of a cable which was unfit for use and dangerous and unsafe. The Supreme Court of Hawaii disposed of the first charge of negligence in the first decision in this case, holding that Ward had assumed whatever risks there were attendant upon working at the end of the conveyor without the protection afforded by a guard rail or platform, 22 Haw. 66, 73 (Tr. 26-27), and nothing in its second decision changed or modified this proposition. Accordingly the only allegation of negligence left for consideration is that with respect to the condition of the cable.

### (a) *The Cable Was Not in a Dangerous Condition Nor Unfit for Use.*

Neither Ward nor any of his witnesses testified that the cable was so weakened by being worn as to render it unsafe to use. In fact Ward himself, when he was given an opportunity of saying that the cable was dangerous, made it as clear as he could that he did not so consider it. Note the following question addressed to Ward and his reply.

"Q. You didn't mean to say that that cable was dangerous then or unfit for use?"

"A. I didn't say anything about that cable being dangerous." (Tr. p. 250).

There was no testimony adduced on behalf of the plaintiff to the effect that because of the condition of the cable any danger of breaking was apprehended, and in fact it did not break.

Ward testified that he told Mr. Gedge, the Secretary and Treasurer of the defendant Company, on the Saturday previ-

ous to the accident, that the cable, by reason of its roughened condition, had a tendency to rise on the pulleys and that consequently a new cable should be put in (Tr. p. 178), but he did not tell Mr. Gedge that there was any danger to be apprehended from the continued use of the cable. In fact all that could be apprehended from Ward's statement was that the cable might come off and that the work of unloading the coal ship might have to be delayed during the time necessary to replace the cable in position. As the entire operation of replacing the cable after it had come off had been performed on this particular Saturday in between twenty and thirty minutes (Tr. p. 82) and without any difficulty whatsoever, *because the weight had been lifted and the tension taken off the cable,* there was no reason to believe that there would be any danger in continuing the use of the cable.

And yet it was contended by counsel for the defendant in error in the Supreme Court of Hawaii that "the best proof of the dangerous and unsafe nature of the cable was afforded in the accident itself." **That this contention is unsound is evident** from an examination of the facts of the accident, for when the cable came off on the Monday in question no one was injured thereby. Neither Ward nor any one else was struck by the cable while it was in the act of coming off the pulleys; no car was thrown off the track. Nothing, in fact, occurred except that work on the conveyor had to be suspended until the cable could be replaced in position. Taking the evidence of what actually occurred in connection with the uncontroverted evidence of Mr. Young as to the strength of the cable at the time of the accident being twelve to fifteen times the strain to which it was subjected (Tr. pp. 616-618) the conclusion is beyond question that the cable was not dangerous or unsafe.

The only proof adduced by plaintiff in respect to the condition of the cable was that it had become roughened and worn so that at intervals throughout its length some of the small wires, of which the strands of the cable were formed, stuck out from

the cable from a sixteenth of an inch to about one inch in length (Tr. pp. 63, 177).

Two of the witnesses for plaintiff testified that, on the Saturday immediately before the Monday on which the accident occurred, the cable came off the pulleys at the makai end of the conveyor and after it had been replaced on the pulleys and the engine started again, they observed the cable while it was in operation in order, as they said, to determine the cause of its coming off. They both testified that they observed the cable rise and fall on the pulleys, due, as they thought, to its roughened condition. At this time the rising of the cable on the pulleys was not sufficient to take it above the top of the pulleys. Neither one, however, observed the cable come off the pulleys (Tr. pp. 66, 84-85, 176-177).

From the fact that these two men testified that they observed the cable on this occasion and saw it had a tendency to rise and fall on the pulleys, plaintiff makes the claim and, in fact, bases the entire case against the defendant Company upon the assumption that the cable came off the pulleys on the day of the accident by reason of its roughened condition. As a matter of fact, however, this particular cable had come off the pulleys at this point two or three times in the period of about four weeks immediately preceding the date of the accident (Tr. p. 98). As no one saw the cable come off on these occasions or on the day of the accident, it cannot even be assumed that its roughened condition was the cause of its coming off on the day of the accident or on the other occasions.

In an endeavor to show that a roughened cable was not suitable for use on the conveyor Ward testified that during all of the time he had been on the conveyor he had never seen any cable come off at the makai end. This negative statement did not prove that no cable had ever come off at that point before—but it went as far as negative testimony can. Against this and absolutely unquestioned is the evidence of Mr. Gedge that the cable came off on the curves practically every time a coal ship

was being unloaded, a matter of five or six times a year—and regardless of whether the cable was new or worn (Tr. p. 399).

Moreover this particular cable was practically as rough when the first of the foreign coal ships came in as it was at the time of Ward's accident (Tr. pp. 93-95, 98-99)—and the cable continued in use six days after that—during which all the cargoes of three coal boats—averaging five thousand tons each, 15,000 tons in all, were discharged by this cable (Tr. pp. 152, 386). Certainly a cable which was unfit for use could not have done this amount of work. The only conclusion justified by the evidence is that the cable although roughened and worn was fit and suitable for the use to which it was put.

The defendant Company was not permitted by the trial court to show the reason why the old cable was replaced six days after the accident by a new cable. It cannot be assumed from this, however, that the cable was taken out because of any danger to be apprehended from its continued use. On the contrary the most natural assumption and the only one to be indulged in, in the absence of evidence to the contrary, is that the work of unloading these coal ships having been completed, all of the appliances on the conveyor, including the cable, were overhauled and put in first class condition either by repairs or replacements so that there would be no necessity for delay when the next occasion came for the use of the conveyor.

After this cable had been taken out and replaced by a new one, it was kept upon the wharf for some time and eventually given away as the defendant Company had no further need for it.

During the course of the trial counsel for Ward tried to make it appear that the giving away of the cable was clear proof of the fact that it was no longer fit for use. In a sense it is true that the cable after it was taken out was not fit for further use as a *hauling cable* on the conveyor—not however because it was too roughened for further use or because it had become too weak to carry the strain, but because it would be practically impossible to use it again. The reason is evident when it is re-

membered that the ends of the cable had to be spliced together when originally installed in order to make it endless. To take the cable off it had to be cut (Tr. p. 422). After the cable was cut the length would not be sufficient for a new splice. Under the circumstances it is plain that even a comparatively new cable would be of no further use on the conveyor, because it would be too short to permit of splicing the ends together after it had been cut in two.

In the absence of evidence as to the cause for removing the cable (a matter on which the trial court would not admit evidence, Tr. pp. 420-421) the court is not entitled to draw inferences as to the cause, adverse to the defendant, especially in view of the work it did after the accident.

In endeavoring to show the defendant company negligent in continuing the use of the cable Ward testified that the "life of a cable" was only eight months (Tr. p. 203). The fact that other cables had been in use—some only two weeks (Tr. p. 205) and others fifteen months (Tr. p. 416) shows that Ward's statement does not even amount to an opinion but can be considered only as a claim. No useful purpose will be served by attempting to have this question decided for it is not essential to a decision of the case as the point in issue is not whether, generally speaking, the life of a cable is eight or ten months—but whether this particular cable at the time of the accident was dangerous for use.

From the evidence in the case respecting the condition of the cable, we submit that the only conclusion which is warranted is that although worn and roughened it was fit and suitable for use and not dangerous, and further that the plaintiff failed to prove that it came off the pulleys, on the date of the accident, because of its roughened condition.

In considering the condition of the cable in connection with the fact that an accident occurred in which Ward was seriously injured, it should be borne in mind that the accident occurred not while the cable was in motion, but after it had come to rest and had been at rest for some time. There is nothing in the

case from which it can be assumed that the accident would not have happened had a new cable come off at this particular point. The condition of the cable, so far as the evidence showed, had no effect whatsoever upon making Ward fall to the wharf below. The roughened condition, if in fact it was the cause of the cable coming off the pulleys, ceased to operate as soon as the cable had come off the pulleys and had been brought to rest by stopping the engine. The danger that existed after the cable came off, and the cause of Ward's accident, was not the roughness of the cable, but the fact that Ward attempted to replace the cable at this dangerous place without first lifting the weight which kept the cable taut. There, and there alone, is where the danger existed. The conclusion, therefore, must be that it was the way Ward attempted to replace the cable that was dangerous and not the cable or its condition.

In the second decision in this case by the Supreme Court of Hawaii, it was assumed that the facts were not materially different from those disclosed in the first decision and therefore the Court assumed that it had decided that the contention of Ward that the Company was negligent in permitting the use of the cable had been established. In the first decision the Supreme Court of Hawaii held *on facts materially different from those brought forth in the second trial* that the cable came off the pulleys on the day of the accident by reason of its roughened condition; that the cable was in a dangerous and unsafe condition and that it was unfit for the use and purpose required of it.

We are concerned now only with the second decision in the case and that must stand or fall on the facts brought out in the second trial regardless either of the first decision or the evidence then before the court. An examination of the record before this court will show that the Supreme Court reiterated the findings made in the first decision without having evidence before them to sustain those findings.

The evidence in the record to which we have called attention does not, we submit, justify a finding that the Company was negligent in permitting the use of the cable.

(b) *Assuming the roughened condition of the cable caused the cable to slip off the pulleys, at the most it merely furnished the occasion for Ward's going to replace it, and the condition of the cable was therefore not the proximate cause of the accident.*

As we have already stated the only claim made by plaintiff as to the cable is that it was roughened and worn and on account of this condition it came off the pulleys on the day of the accident and that the Company's permitting the use of this cable constituted negligence on its part. It is not alleged in the complaint nor was there any evidence tending to show that the roughened condition of the cable operated to do anything other than cause the cable to come off the pulleys. There is no claim or evidence to support it that Ward or any one else was injured by the cable coming off the pulleys nor even that any coal cars were derailed by reason of the cable coming off the pulleys.

The evidence is clear and undisputed that after the cable had come off the pulleys the engine and the drum which operated the cable were stopped and the cable brought to rest and that not until the cable was absolutely at rest did Ward even start to go to the place where the cable was off the pulleys (Tr. p. 183). In other words all the harm that could have been anticipated from the continued use of the roughened cable had occurred before Ward even went to the place where the cable was off.

A considerable interval of time elapsed between the coming off of the cable and Ward's arrival at that place for Ward had to walk the distance from the scale house to the end of the conveyor (Tr. p. 183), approximately three hundred feet, to get to where the cable was off.

Upon his arrival at the place where the cable was off, Ward "sized up" the situation and decided that he could pry the cable

back into position by the use of crowbars without lifting the weight and thereupon attempted to carry his plan into execution. There was no evidence to the effect that the roughened condition of the cable made it more difficult to replace than a new cable, nor can this be assumed. The danger attendant upon prying the cable back into position or doing any work at this place was obvious, for from the top of the trestle, where the cable was off, to the wharf below was twenty-five feet and the distance between the cable and the outer edge of the trestle was less than two feet. Beyond the ends of the ties there was nothing, either in the shape of a platform or a guard rail, to prevent a fall to the wharf below (Tr. p. 185). All that was necessary to bring about a fatal accident to Ward was that he should lose his balance and fall over the edge. And that is precisely what occurred, for while Ward was attempting to pry the cable back into position something slipped, either his crowbar or the cable and Ward lost his balance and fell over the edge down to the wharf below.

To entitle the plaintiff to recover from the defendant it is essential that he show that the defendant's negligence was the proximate cause of the accident and did not merely furnish the condition or give rise to the occasion which made the injury possible. The distinction in this regard is clearly indicated in the following definitions of proximate cause.

Judge Cooley defines proximate cause as follows:

> "A proximate cause has been aptly defined as one which in natural sequence undisturbed by any independent cause produces the result complained of. To be proximate the cause must be one without which the accident or injury would not have occurred. It is frequently said that in order that an act or omission shall be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission and such as an ordinarily reasonable and prudent man under the given circumstances might and ought to have seen in advance. . . . . In determining what is a proximate cause the true rule is

that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been forseen by the wrongdoer as likely to flow from his act."

1 Cooley on Torts. (3rd ed., pp. 124-125).

South Side Passenger Ry. Co. v. Trech., 117 Pa. St. 390, 11 Atl. 627.

In Cyc. the following is said with regard to proximate cause:

"In order to establish proximate cause it is necessary in the first place that there be a causal connection between the negligent act and the injury. The act must have been such that without it the injury would not have happened. It must have been the cause which produced the injury, the *causa causans,* and hence where the act did not contribute to the injury it cannot be the proximate cause. The mere fact that the negligence in point of time preceded the injury does not of itself establish the causal connection .....". (29 Cyc. 489)

"If the injurious result could have been avoided by the exercise of care the original cause is not the proximate cause." (29 Cyc. 491)

On pages 492-495 of 29 Cyc. there follows a statement of the law very similar to that above quoted from Judge Cooley.

In 29 Cyc., page 496, the following appears:

"A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct successive unrelated and efficient cause of the injury. If no danger existed in the condition except because of the independent cause such condition was not the proximate cause, and if an independent negligent act or defective condition sets into operation the circumstances which because of the prior defective condition result in injury, such subsequent act or condition is the proximate cause."

Applying the principles laid down in the foregoing quotations to the facts in the present case, we submit that the roughened condition of the cable "did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible" and that "there intervened between the prior or remote cause," i. e. the roughened condition of the cable, "and the injury a distinct, successive, unrelated and efficient cause of the injury," to-wit: Ward's attempting to pry the cable back into position without first lifting the weight, at a place made hazardous by the absence of a platform or guard rail which, had it been in position, would have prevented Ward from falling to the wharf below. In other words Ward's own act was the proximate cause of the accident.

It was contended by Ward in the Court below, and no doubt will also be contended here, that there was no intervening agency between the negligence of the Company and the injury to Ward because Ward's act was set in motion and made necessary by the Company's negligence. In other words the argument is that if the cable had not been rough it would not have come off and if it had not come off Ward would not have gone to replace it and the accident would not have occurred. Hence it is argued that Ward's act was not independent but was dependent, and closely connected with the Company's negligence.

This argument is unsound because the coming off of the cable resulted in no injury to Ward. The true test in determining whether the Company's negligence was the proximate cause is to ascertain whether that negligence alone and unassisted by any other act or agency accomplished the injury.

The fact that only five or ten minutes elapsed between the coming off of the cable and Ward's injury does not of itself prevent Ward's act from being independent, distinct and unrelated to the condition of the cable. Had the cable come off on Saturday afternoon at quitting time and Ward had then decided to wait until Monday morning before replacing it and then on Monday Ward had done what he actually did, it would be perfectly clear that Ward's act on Monday was entirely independ-

ent. Whether Ward replaced the cable as soon as it came off or waited a day or a week or a month before doing so, the coming off of the cable would have been the cause of Ward's going to replace it and if counsel's argument is sound no matter what length of time intervened the roughened condition of the cable would have been the proximate cause of the accident.

If counsel's contention is correct the Company would be liable for Ward's injuries had he stumbled and fallen to the wharf below while on his way to the place the cable was off. It is evident that the contention carried to its logical conclusion is preposterous.

The real question that is presented is this: Did the defective condition of the cable alone cause Ward's injury or was there something independent of this which operated to cause it? The only answer justified by the evidence is that the defective condition of the cable did not cause any injury to Ward. The injury was caused by his independent act in attempting to replace the cable without lifting the weight *coupled with the fact that there was no guard rail at this place to prevent him from falling to the wharf below in case he slipped or lost his balance.*

The evidence of Ward himself shows that the roughened condition of the cable had no effect whatever in making it harder or easier to replace in position. The evidence of Prof. Young on this point (it is all there is) is that a new cable is more difficult to handle than an old one (Tr. p. 764), and he gives substantial reasons for his opinion and the uncontradicted testimony in the case shows that cables in good condition had frequently come off the pulleys at the makai end of the conveyor and had to be replaced (Tr. pp. 551-552).

The coming off of the cable at this point two or three times during the month before the accident (Tr. p. 98) was not shown to have been caused by the condition of the cable. Consequently we submit that the evidence justifies the conclusion that a new cable was just as likely to come off the pulleys as a roughened

one. Therefore under the rule laid down in Baltimore R. R. Co. vs. Reaney, 42 Md. 136, the defendant would be exempt from liability.

In the Court below counsel for Ward contended that there was no distinct, unrelated, successive and efficient cause which intervened between the negligence of the Defendant and Ward's injury. No doubt the same contention will be made here. This is practically the same proposition as that set out above put in different language. It cannot be denied that Ward attempted to pry the cable back into position and it was that act of Ward's at a dangerous place which resulted in the fall and injuries to Ward. We contend that this act of Ward's was independent, distinct, unrelated, successive and efficient. Whether it was distinct, unrelated and independent depends upon whether the condition of the cable had any effect in producing the accident. Plaintiff did not contend in the trial that the condition of the cable had any effect whatsoever upon the actual operation of replacing the cable in position nor was that argument made before the Supreme Court of Hawaii. Under these conditions Ward's act was independent of the condition of the cable and distinct from it. It was also unrelated to the condition of the cable for Ward would have had the same situation to deal with had a new cable instead of the one in question come off the pulleys at this point. That Ward's act was efficient in causing the accident is beyond question.

No matter how this question is approached the logical conclusion must be the same, viz. that the condition of the cable at the most furnished the occasion for Ward's going to replace it, but that Ward's act was independent, distinct, unrelated, successive and efficient and the cause of his accident.

The following cases are illustrative of this proposition:

Missouri Pac. R. Co. vs. Columbia 65 Kan. 390; 58 L. R. A. 399.

Carter vs. Lockey Piano Co., 177 Mass. 91; 58 N. E. 476.

Cattle Co. vs. Atchison T. & S. F. Ry. Co. 135 Fed. 135, 140.

The Santa Rita 173 Fed. 413.
Stone vs. Boston & A. R. Co. 171 Mass. 536, 41 L. R. A. 794, 797.
Teis vs. Smuggler Mining Co. 158 Fed. 260.
Scheffer vs. Railroad Co. 105 U. S. 249.
Am. Bridge Co. vs. Seeds 144 Fed. 605.
Conley vs. Express Co. 87 Me. 352.
Jackson vs. Gulf Elevator Co. 209 Mo. 506, 108 S. W. 44.
Jenks vs. Wilbraham 11 Gray (Mass.) 142.
Lutein vs. Hurley 98 Mass. 211.
Jennings vs. Davis 187 Fed. 703, 713.
Lamotte vs. Boyce 105 Mich. 545.
McGough vs. Bates 21 R. I. 213.
Pryor vs. L. & N. R. Co. 90 Ala. 32, 8 S. 55.
C. N. O. & T. P. Ry. Co. vs. Mealer 50 Fed. 725.
Foley vs. McMahon (Mo.) 90 S. W. 113.
Luxen vs. Chicago & G. T. R. Co. 69 Ill. 648.
Trapp vs. McClellan 74 N. Y. Supp. 130.
See also 29 Cyc. 488-502.

In view of the foregoing we submit that the defective condition of the cable was not the proximate cause of the accident.

I. (b-1) *While ordinarily the determination of the proximate cause is for the jury, yet where reasonable men can come to but one conclusion from the facts the question is one of law for the court.*

The first decision in this case reported in 22 Haw. 66 (Tr. pp. 16-33) does not go so far as to hold that the question of proximate cause is never to be determined by the court. There is nothing in the decision from which it can be inferred that the court intended to go so far, nor does the case of Milwaukee & St. P. R. Co. vs. Kellogg, 94 U. S. 469, which was evidently the basis of this decision, lay down any such rule. In the latter case the Supreme Court of the United States, after stating the general rule to be that ordinarily the determination of proximate cause is a question for the jury, went on to analyze the evidence in that case and sustained as good law the very propositions which the jury had decided. The question which had

to be determined there was whether the negligence of defendant in setting fire to one building was the proximate cause of the burning of an adjoining building, there being no intermediate efficient and independent cause operating between the original negligence and the final injury. In the view which the Supreme Court took of the facts before them in that case, there was no occasion for defining the cases in which the question of proximate cause would be a matter for determination by the court.

But the very fact that the Supreme Court recognized that there must be an unbroken connection between the wrongful act and the injury, and that if there were an independent intermediate efficient cause operating between the original wrong and the injury, the injured person must look to the person responsible for the intermediate cause for his damages rather than to the original wrongdoer, makes it evident that, had the Supreme Court considered that the evidence in the case before them justified or demanded the finding that there was such an intermediate cause, they would have reversed the case and sent it back for a new trial. In other words, they would have considered the question then one for the court and not for the jury. In the case of Scheffer vs. Railroad Company, 105 U. S. 249, 26 Law. Ed. 1070, the facts were these: A collision occurred between two railroad trains and a person was so injured thereby that he subsequently became deranged and committed suicide. The Supreme Court of the United States held, as a matter of law, that the proximate cause of this man's death was his own act, and that the Railroad Company was not liable therefor.

On the proposition that where the facts are not in dispute the question of proximate cause is properly treated as one of law for the court, we respectfully refer this Court to the following cases:

Teis vs. Smuggler Mining Co. 158 Fed. 260, 269.

Clark vs. Wallace, 51 Colo. 437, 27 A. & E. Ann. Cases 349, and Case Note P. 353.

Moulton vs. Gage, 138 Mass. 390.

O'Maley vs. Boston Gas Light Co., 158 Mass. 135, 47 L. R. A. 161.
Franch vs. Columbia Spinning Co., 169 Mass. 531.
Hamelin vs. Malster, 57 Md. 287.
Scheffer vs. Railroad Co., 105 U. S. 249.
McKenna Steel Working Co. vs. Lewis, 111 Fed. 320.
Tuttle vs. Detroit etc. Ry., 122 U. S. 189.
Am. Bridge Co. vs. Seeds, 144 Fed. 605.
Conley vs. Express Co., 87 Me. 352.
Jackson vs. Gulf Elevator Co., 209 Mo. 506, 108 S. W. 44.
Jenks vs. Wilbraham, 11 Gray 142. (Mass.)
Coal Co. vs. S. S. Co., 142 Fed. 402, 409.
Lutein vs. Hurley, 98 Mass. 211.
Jennings vs. Davis, 187 Fed. 703, 713.
Lamotte vs. Boyce, 105 Mich. 545.
McGough vs. Bates, 21 R. I. 213.
Pryor vs. Louisville & N. R. Co., 90 Ala. 32, 8 S. 55.
C. N. O. & T. P. Ry. Co. vs. Mealer, 50 Fed. 725.
Foley vs. McMahon (Mo.), 90 S. W. 113.
Trapp vs. McClellan, 74 N. Y. Supp. 130.
See also 29 Cyc. 488-502.

Since, therefore, it appears that the only act of plaintiff which can be claimed to have been negligent was in permitting the use of a *roughened* cable, not shown to be either dangerous or unsafe, and which in fact did no injury but merely slipped out of position, and since this slipping furnished nothing but an occasion for the doing of certain work during the performance of which the injury occurred, we submit that on this branch of the case the defendant was entitled as a matter of law to a nonsuit, to its requested instruction for a verdict in its favor and to a verdict from the jury, and that consequently the judgment should now be reversed.

The case upon which plaintiff mainly relies to sustain the judgment of the Supreme Court of Hawaii and which that Court practically followed in its first decision, is Chicago R. I. & P. R. Co. vs. Moore (Okla.), 43 L. R. A. (N. S.) 701. Judge Perry in his dissenting opinion in the first decision in

this case clearly distinguished the Moore case (see Tr. pp. 27 to 33).

A comparison of the facts in the two cases in parallel columns will be of assistance in showing their dissimilarity:

| | |
|---|---|
| In the Moore case the breakdown could not have occurred if proper inspection and repair had been made. | In the Ward case the coming off of the cable was of frequent occurrence and could not have been prevented by putting a new cable in place of the one in use. |
| In the Moore case the negligence of the Company enhanced the risk of injury for two reasons: 1. Because the exact nature of the break could not be seen by the Plaintiff; and 2. Because the Plaintiff's duties did not require him to make any repairs except emergency repairs the occasion for which could not have been prevented by proper inspection. | In the Ward case the negligence of Defendant, if any, did not enhance the risk of injury for two reasons: 1. Ward could see exactly what had occurred, nothing was hidden nor obscure and the danger of falling to the wharf was evident and Ward knew that he must guard himself from that; and 2. Ward's duties required not merely the making of emergency repairs and replacements but attending to any part of the conveyor whenever it got out of order. |
| In the Moore case the Defendant was charged with knowledge of the fact of the defect and must have known that some sort of injury was liable to result. | In the Ward case the Defendant was not charged with knowledge of the defect even if told by Ward because Ward was foreman in charge of the conveyor, knew of the spare cable and had authority and discretion, without consulting Gedge, to see that a new cable was put in if he deemed it advisable (Tr. 338). The |

Defendant had no reason to foresee that Ward would recklessly attempt to restore the cable without first lifting the weight.

Moreover the only injury which could result from the condition of the cable was delaying the work of discharging coal during the time necessary to replace the cable, twenty or thirty minutes, an injury not to Plaintiff but to Defendant.

We submit that from the foregoing comparison it will be seen that the facts in the Moore case differ essentially from those in the case at bar. There is however dictum in the Moore case and good law and which applied to the facts in the case at bar prevents recovery by the Plaintiff.

In the Moore case the Court said, "Neither could an employee regularly engaged in repairing machinery of the Company recover for an injury received .... however negligently the necessity for repairs might have been caused if it was his regular business to repair and the danger in his employment was exactly the same whether the repairs were made necessary by negligence or accident." 43 L. R. A. (N. S.) 706.

In the present case the Plaintiff was employed as foreman of the conveyor and it was part of his regular duty to make repairs and replacements whenever anything got out of order. The duties and dangers of his employment were the same whether the cable came off because of negligence or accidentally. (Tr. pp. 117-118, 127-128, 191, 217, 381, 391, 400, 511-512, 548, 563.)

## II. WARD HIMSELF WAS GUILTY OF NEGLIGENCE WHICH NOT ONLY CONTRIBUTED TO THE INJURY BUT WITHOUT WHICH THE INJURY WOULD NOT HAVE OCCURRED.

Probably no man in the employ of the defendant corporation knew more as to the actual construction and operation of the coal conveyor and all its appliances than plaintiff himself, for he erected all of the steel work of the conveyor, and all of the appliances connected with it (Tr. pp. 214-215): he was foreman of the conveyor from the time that the conveyor was erected up to the time that he was hurt, and had charge of its operation whenever foreign coal ships were in port discharging their cargoes (Tr. p. 216). He was foreman of the conveyor and bossing the men when the first cable was installed (Tr. p. 215), and before each coal boat came in Ward went down to the conveyor and looked things over to see that everything was in good working order (Tr. p. 127-128). He knew that by raising the weight the tension on the cable was removed and that slack could easily be obtained thereby sufficient and without the need of a crow bar or other tool to put the cable back in position after it had come off the pulleys (Tr. pp. 189). He also knew that the tension or spring on the cable at the point by the eight pulleys was outward and away from the track, in the direction in which he fell because he had to pry in the opposite direction (Tr. pp. 185, 291-292). Akina, one of plaintiff's own witnesses, and a man who had worked on the conveyor for a shorter period than had Ward, testified that the first thing to do when the cable was off was to lift the weight and get the slack (Tr. 138). Ward's familiarity with the conveyor and its mechanical appliances should be borne in mind in considering whether he was negligent in choosing the method by which he attempted to replace the cable on the pulleys.

The effect on the cable of lifting this weight was to remove the tension to such an extent that in the straight parts of the tracks, the cable, instead of merely touching the horizontal dol-

lies, would sag between these dollies and touch the ties. By thus lifting the weight it was found that there was sufficient slack at the makai end of the conveyor so that one man (George Dennison), using only his hands, was able to lift the cable from its position on the eight pulleys at the beginning of the curve and throw the cable entirely out of position. Mr. Dennison stated that the slack appeared at this point (the makai end of the conveyor) within two minutes from the time the weight was lifted (Tr. p. 662). Not only was this witness able to put the cable in this position after the weight had been raised and the tension on the cable removed but was able by the use of his hands alone to put the cable back in its proper position again (Tr. pp. 661-663).

According to the contention of plaintiff the only way in which sufficient slack could be obtained so as to perform the operation testified to by Mr. Dennison, was to lift the weight, then go upon the railway track by the scale house, haul on the cable until the slack had been obtained, then proceed along the track for a hundred feet or so and again haul this slack forward and continue in this way from the scale house clear around to the coal dumping yard and the curved end of the track at that point and then back around to the track on the Ewa side of the coal conveyor to the point where Mr. Dennison performed his experiment, and that this operation would take at least two hours, and yet he admitted (Tr. p. 184) that the reason he did not lift the weight was that there was sufficient slack to replace the cable without first lifting the weight. However Akina on the Saturday before the accident when the cable was off lifted the weight, and obtained slack sufficient to put the cable back by hand (Tr. pp. 70-71) without doing any hauling on the cable and the entire time required in putting the cable back in position was twenty or thirty minutes (Tr. p. 82). Whether Ward was right or not as to the necessity of hauling the cable clear around the track to get the slack the fact remains that he knew of a safe, although possibly slow, method of obtaining slack *and releasing all tension from the cable*—and yet did not adopt that method,

choosing in its place the method which was obviously dangerous and which proved disastrous.

Akina, one of the plaintiff's witnesses, said that the first thing to do when the cable came off was to lift the weight and get the slack, and if sufficient slack was not obtained in this way then to pull the cable around until it had been obtained at the place where needed (Tr. p. 138).

Akina and Merseberg testified that on the Saturday immediately before the accident the weight had been lifted, and upon doing this sufficient slack was obtained to permit of putting the cable back in position by hand (Tr. pp. 67-68, 71, 138), and Merseberg testified that the total time elapsing between the time that the cable came off until it was replaced and running again was not more than twenty or thirty minutes (Tr. p. 82).

Ward knowing what could be accomplished by raising the weight, went to the place where the cable was off, sized up the situation and evidently decided to attempt to pry the cable back without releasing the weight; he says as mentioned above that there was sufficient slack to permit of replacing the cable in position without lifting the weight (Tr. p. 184). That he was wrong in this conclusion is self-evident.

Ward knew that the place where he was working was dangerous. He could see that a fall from that place to the wharf below meant very serious bodily injury if not death, and he knew there was no guard rail or other protection to prevent this in case he slipped or lost his balance. Knowing these things he attempted to replace the cable in a way that not only placed him in danger of his life, but also the men working with him. Under these circumstances we submit no other conclusion can be reached than that Ward was grossly negligent in attempting to replace the cable on the pulleys at that place without first releasing the tension on the cable by lifting the weight. It is also beyond question from these facts, we submit, that it was Ward's negligent action in this regard which not merely contributed to the accident, but without which the accident could not have occurred.

Hamelin vs. Malster, 57 Md. 287.
Kansas, etc., Co. vs. Reid, 85 Fed. 914.
Gleason vs. Detroit, etc., Ry. Co., 73 Fed. 647.
Morris vs. Duluth, etc., Ry. Co., 108 Fed. 747.
Labatt Employer's Liability, Sec. 298.
Brennan vs. Front St. Cable Ry. Co., 8 Wash. 363.
Watts vs. Boston Towboat Co., 161 Mass. 378.
Ringer vs. St. Louis & S. F. R. Co., 116 Pac. 212.
Russel vs. Tillotson, 140 Mass. 201.
Leard vs. Paper Co., 100 Me. 59.
Williams vs. Kansas City Ry. Co. (Mo.), 52 L. R. A. (N. S.) 443, 452.

There is a clear distinction between the doctrine of assumption of risk and that of contributory negligence. Warning the master of defects and receiving a promise to repair is not involved in the doctrine of contributory negligence. The warning of the master by the servant and the master's promise to repair does not relieve the servant of the duty of exercising care, and such care should be proportionate to the danger.

Reeser vs. Southern Planing Mill, Etc., Co., 114 Ky. 1.
Halloran vs. Iron, etc., Co., 133 Mo. 470.

While it is true that contributory negligence is frequently a question for the jury yet this is not always so, and when it clearly appears that only one conclusion can follow from the evidence the court should consider the question one of law and treat it accordingly.

Nehring vs. Connecticut Co., 89 Conn. 109; 45 L. R. A. (N. S.) 896.

Watts vs. Boston Towboat Co., 161 Mass. 378.
Brennan vs. Front St. Cable Ry. Co., 8 Wash. 363.
Ringer vs. St. Louis S. F. R. Co., 116 Pac. 212; 34 L. R. A. (N. S.) 1044.
Pryor vs. Louisville & N. R. Co. (Ala.), 8 So. 55.
Gleason vs. Detroit, etc., Ry. Co., 73 Fed. 647.
Slaughter vs. City of Huntington (W. Va.), 16 L. R.

A. (N. S.) 459.
McKenna Steel Working Co., vs. Lewis, 111 Fed. 320.
Tuttle vs. Milwaukee Ry., 122 U. S. 189.
Labatt, Employer's Liability, Sec. 391.
Erskine vs. Chino Val., etc., Co., 71 Fed. 270.
29 Cyc. 630.

## III. WARD ASSUMED ALL RISKS ATTENDANT UPON REPAIRING ANY DEFECTIVE APPLIANCES WHICH HINDERED OR STOPPED THE OPERATION OF THE CONVEYOR, THAT WORK BEING PART OF HIS REGULAR DUTY.

The record shows that Ward was foreman of the conveyor and in charge of its operation whenever coal ships were being discharged and that if anything got out of order it was his duty to place it in proper working order (Tr. pp. 117-118, 127-128, 191, 217, 381, 391, 400, 511-512, 548, 563). On the day of the accident, when the cable came off the pulleys, it was Ward's duty to replace it in position in order that the work of unloading the coal ship could proceed. Ward contends that because the roughened condition of the cable made it come off the pulleys and he, therefore, was in duty bound to replace it—he can hold the defendant liable for the injuries sustained while attempting to so replace the cable because of defendant's negligence in not putting in a new cable. In other words, Ward seeks to hold defendant liable because of the defective appliance which he was attempting to repair, work which came within the regular scope of his employment.

We submit that Ward's contention is not sound, because the rule which casts upon the master a liability for failing to provide reasonably safe instrumentalities for the use of his servants is suspended when the servant is engaged in the work of repairing the defective appliance complained of. In other words, a servant put to work to repair a defective appliance cannot be heard to complain of its being defective, inasmuch as that very

thing is the cause of his being there and he undertakes to set it right, being paid for the risks he runs and voluntarily incurring them.

Labatt, Sec. 1176 and cases cited, on pages 3135 to 3140 inclusive.

Armour vs. Hahn, 111 U. S. 313, 28 L. ed. 440.

Colorado Coal & I. Co. vs. Lamb, 6 Colo. App. 255, 40 P. 251, 255.

Marshall vs. St. Louis, I. M. & So. Ry. Co., 78 Ark. 213, 8 A. & E. Ann. Cases 420, and note.

III. (a) *The promise to replace the cable being made with respect to the efficiency of the work and not with respect to the safety of the workmen did not relieve Ward, as a matter of law, from his assumption of the risks connected with replacing it on the pulleys.*

Ward's statement to Gedge on the Saturday before the accident that the cable, because of its roughened condition, had a tendency to rise on the pulleys and Gedge's promise to put in a new cable (assuming this statement and promise to have been made) were made with respect to the efficiency of the conveyor. Ward testified as follows:

> "When Mr. Gedge came down he came aboard the ship and I told him that that cable came off and the cause of it coming off and I told him they would have to have a new cable and he said all right we will put a new cable in." (Tr. p. 178.)

Ward did not tell Gedge that any danger was to be apprehended from the condition of the cable nor can it be inferred from what Ward said to Mr. Gedge that any danger was to be apprehended from the continued use of the cable other than that by its coming off again, the work of unloading would be delayed. Consequently Mr. Gedge's promise must be considered as being made with respect to efficiency and not danger.

Consequently we submit that this promise did not relieve Ward from the assumption of the risks attendant upon the work of replacing the cable.

Dunphey vs. Farr & Bailey Mfg. Co., 83 N. J. L. 763; 85 Atl. 203; 45 L. R. A. (N. S.) 363 and cases cited in note.

## IV. THE COURT DID NOT FOLLOW NOR PROPERLY APPLY THE PRINCIPLES LAID DOWN BY IT IN ITS FIRST DECISION, WHEREIN IT HELD THAT WARD ASSUMED WHATEVER RISKS THERE WERE BECAUSE OF THE LACK OF A GUARD RAIL.

It is clear from Ward's testimony that had there been a guard rail or platform at the makai end of the conveyor that he would have been prevented from falling to the wharf below and being injured as he was. Ward in describing what happened to him after the cable slipped said: "I was hurled to the wharf and was looking for something to get hold of—I was looking for something to protect myself to get hold of—there was no platform or rail at that particular point on that occasion" (Tr. p. 185).

Ward knew that there never had been a guard rail at this place (Tr. p. 215)—for he was in charge of the erection of all of the steel work of the conveyor including the installation of the rails and pulleys at this place as well as elsewhere on the conveyor (Tr. p. 150) and besides this he had been foreman of the coal conveyor whenever there were foreign coal ships being discharged for about five years before his injury (Tr. pp. 216, 116). He had been at this particular place on the Saturday before he was injured and had stayed there long enough to make up his mind as to the cause of the cable coming off the pulleys on that day (Tr. p. 176). The Supreme Court of Hawaii held that the risks attendant upon the lack of a guard rail or platform were assumed by Ward so that this question is not open to argument (See Tr. pp. 26-27).

Assuming, for the purposes of the argument, that the roughened condition of the cable gave it a tendency to rise on the

pulleys and that this was the cause of its coming off on the day Ward was injured, there were three elements which, when combined, resulted in Ward's injury:

First; the cable came off the pulleys because of its roughened condition and made the occasion for Ward's going to replace it; Second; Ward attempted to pry the cable back into position without lifting the weight, and thereby releasing the tension on the cable; and Third; because there was no guard rail or platform to prevent it, Ward upon slipping or losing his balance fell from the track to the wharf twenty-five feet below and was thereby injured.

The first element furnished merely the occasion for the accident. It was not the cause, as we have already shown. As to the second factor: If Ward had lifted the weight there would have been no tension on the cable—and hence no difficulty in replacing it on the pulleys by hand as was done on the Saturday by Akina, and again there would have been no accident. Therefore Ward himself chose a course of action which directly brought about his injury—and this act of Ward's was, if not the sole cause, certainly one of the concurring causes. And in the third place if there had been a guard rail or platform Ward would have been prevented from falling to the wharf and probably from being injured at all. But though possibly this may be considered as a concurring cause, yet this risk was assumed by Ward.

The conclusion then is that of the two causes producing the injury, one was Ward's own act, whether negligent or not, and the other was a risk assumed by him even if the defendant was negligent in that regard.

In other words if we assume, as we are bound to do, from the evidence, that the accident would have been prevented by a guard rail, then in view of the ruling that plaintiff had assumed the risk from the lack of the guard rail it follows that the plaintiff solely is responsible for his injury. In order to hold the defendant responsible for plaintiff's injury, we must ignore the fact that plaintiff assumed the risk of the lack of the

guard rail—in other words we must hold that plaintiff did not assume the risk.

As the facts in the second trial upon this question of assumption of risk warrant the same holding as was made in the first decision it follows that the second decision—holding plaintiff entitled to a recovery—is inconsistent with the court's rulings in both decisions, and consequently the judgment should be reversed.

*The Decision of the Supreme Court of Hawaii.*

Without in any way intending any disrespect to the Supreme Court of Hawaii we feel that in several particulars the decision contains statements as to the facts of the case which are not justified by the evidence. In addition therefore to what has already been said we desire to call particular attention to these statements in order that this Court may be advised thereon.

Near the beginning of the decision (Tr. pp. 770-771) the Supreme Court says:

> "But it is the duty of the master to furnish suitable and safe appliances for his servants to conduct his business with, and this duty is not fulfilled by simply furnishing appliances that may be used, but which *owing to their defective condition, are liable to be misplaced and thereby necessarily subjecting the servants to extraordinary risks by replacing them.*"

As we view them the portions in italics assume, if they do not state, propositions not supported by the evidence in the case. The words "appliances . . which owing to their defective condition, are liable to be misplaced" assume, as a fact in the case, that only a defective cable was liable to become displaced, while a new cable or one in good condition was not liable to become displaced. This assumption is directly opposed to uncontroverted evidence that regardless of whether the cable was old or new it came out of position on the pulleys practically every time a coal vessel was being discharged (Tr. p. 399).

The remaining words in italic "thereby necessarily subjecting the servants to *extraordinary risks* by replacing them" imply that the coming off of the cable was extremely infrequent whereas the evidence shows, as we have just stated, that this was a matter of usual and frequent occurrence. These words also assume that the replacing of the cable, when it had become misplaced, was fraught with great and unusual danger and peril. The evidence of the ease and safety with which the cable was replaced on the Saturday before the accident *when the weight was lifted* shows that this assumption of fact was erroneous (See Tr. p. 81). So also does the evidence of George Dennison (Tr. p. 663) who alone and without tools, using merely his hands lifted the cable out of position as it was when Ward was injured and put it back into its proper position, finding no difficulty because the weight which kept the cable taut had been lifted.

Another similarly erroneous statement as to Ward "incurring an extraordinary hazard which would not have existed if a suitable cable had been installed" is found in the decision (Tr. p. 771).

On pages 771-772 the Court says "the jury were also justified in finding that a man of ordinary care and prudence, under the circumstances, would naturally apprehend that the cable would come off the pulleys, and the foreman Akina being absent, under such circumstances plaintiff would go and attempt to replace it; that being on an elevated trestle, 25 feet above the ground, injury to plaintiff would probably result." At page 784 practically the same statement is again made.

A man of ordinary care and prudence would apprehend that *possibly* the cable would come off and Ward having been employed to keep the conveyor running, he would apprehend that Ward would replace the cable *using the safety appliances—installed and ready for that very purpose*—to-wit: lifting the weight by means of the block and tackle. He would not apprehend that Ward would attempt to replace the cable without lift-

ing the weight—especially in view of the fact that the place was unguarded by a rail or platform—a fact well known to Ward.

It is evident therefore that the opinion of the Supreme Court is based on an erroneous impression as to the facts. Confirmation of this is found in the Court's quotations from cases in other jurisdictions. For instance on page 774 the Court quotes from Peoria Ry. Co. vs. Puckett, 42 Ill. App. 642, as follows:

> "If a brakeman be required to do such work and while attempting to perform it with care and prudence commensurate with the increased danger of such duty he is injured, not by some *peril attendant upon the manner of doing the work,* but by a danger arising from a failure of the railroad company to use reasonable care to discharge a duty incumbent by law upon it, no reason is perceived why a recovery may not be had for such injury."

The words in italics describe accurately the cause of Ward's injury, i. e.: perils attendant upon his manner of doing the work. The inference from this citation is that Ward's manner of doing the work did not create the danger—an inference diametrically opposed to the facts, as we have shown. The remaining portions of the decision cover points which have already been fully discussed in this brief and require no further comment.

In conclusion we respectfully submit that the judgment of the Supreme Court of the Territory of Hawaii should be reversed and judgment ordered for the plaintiff in error.

Respectfully submitted,

*Attorneys for Plaintiff in Error.*